

Members of the Supervisory Board of Limited Companies in Estonia: The First Cases from the Supreme Court of Estonia

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Abstract

Similarly to German law, Estonian company law Provides two-tier management for all public limited companies. Legal regulation of the liability of members of the management board and supervisory board is the same, and THEREFORE the question Arises of Whether there is any difference in liability between members of different boards. The Estonian Supreme Court recently made two decisions Regarding the liability of members of the supervisory board. The main research question of the article is 'what is the scope of the duties of the supervisory board in comparison to the duties of the management board, and how does the difference in duties affect the liability?' As the main task of the supervisory board is to exercise supervision, the question is what the actual standard of supervision is.

Keywords: director liability; supervisory board; one- and two-tier system; Estonian Commercial Code; German Stock Corporation Act; company law; Corporate Law; corporate governance

1. Introduction

Every limited company^{*1} as a legal person needs special bodies to express its will and carry out its activities.^{*2} Though modern company law in all countries provides special bodies to represent and manage the company, the technical structure of these organs varies widely.

In general, two different approaches are recognizable: Either the company has a single body with several members, who exercise separate functions, or there are two different bodies with separated functions.^{*}
³The so-called prototype for the one-tier system is the Anglo-American public limited company. Article 154 of the United Kingdom's Companies Act 2006^{*4} stipulates that a private company must have at least one director and a public company must have at least two directors. HOWEVER, in legal literature it has been ARGUED that, due to flexible legal regulation, British companies can have different types of managing bodies, as the Shareholders have the Possibility to shape the management system as they like.^{*5}

The classic examples of a two-tier management model are Germany and the Netherlands. As compared to the one-tier system, the two-tier model is a more recent phenomenon. The concept of a two-tier model is based on the idea of an independent supervision, which bedeutet, dass the control over the management must be carried out by an independent and objective body that must be separated from the everyday management.^{*6} The managing bodies of the German public limited company (Aktiengesellschaft) are the management board (board of directors) and supervisory board (Board), both of which must be appointed by the founders of the company.^{*7} The everyday activities are carried out by the management board, and the task of the supervisory board is to control the activities of the management board in general. German private limited companies (limited liability company) normally have one-tier management structure,^{*8th} but some special regulations deriving from co-determination rules can make the supervisory board compulsory therefore for smaller companies.^{*9}

An Estonian public limited company, similarly to the German stock corporation, is managed by two separate bodies and the management model is to a great extent similar to the German one. According to Art. 243 (1) p 7 and Art. 316 of the Estonian Commercial Code^{*10}, Every public limited company must have a supervisory board. According to Art. 189 of the CC, a private limited company shall have a supervisory board if it is provided by the articles of association of the company. As Estonian law does not foresee any co-determination rules, the formation of a supervisory board is voluntary for all private limited companies.^{*11} In case Shareholders decide to choose the two-tier model, the provisions of the CC concerning the supervisory board of a public

company apply correspondingly to the powers and activities of the supervisory board unless otherwise provided by law.

Though Estonian case law has had many examples of claims filed against the members of the management board, Estonian courts have only lately started solving cases where the members of the supervisory board have been sued for damaging the company. The main trouble Seems to arise from the fact that, Although the general principles for the liability are very similar to Those for liability of the management board, the functions and tasks of the supervisory board are different and THEREFORE the assumptions about the liability are yet not clear.

The article addresses the core question of the scope of the powers and obligations of the members of an Estonian public limited company's supervisory board. The main research question is: Whether and to what extent the relevant Estonian case law takes into account the special features Of Those obligations. The purpose of the research is to compare Estonian legal regulation and case law to the relevant German regulations. The above-Mentioned approach is justified Because The German public limited company, as well as its Estonian counterpart, has a two-tier management model.^{* 12}

2. Functions and powers of the supervisory board: A comparative view

2.1. General duties of the supervisory board

.According to law, the supervisory board of Estonian companies has three major functions: general management of the company, planning of the economic activities of the company, and supervision of the activities of the management board. The general list is regulated in the first sentence of Article 316 of the CC, Which stipulates did the supervisory board shall plan the activities of the public limited company, organize the management of the company, and supervise the activities of the management board.

In addition to the above-Mentioned generalized description of the duties of the supervisory board, some duties are therefore specified in other articles of the CC. The duty of the strategic general management^{*}¹³Arises from Article 317 of the CC, and as far as the Shareholders have not determined the main directions of the activities With Their decisions, it is the power of the supervisory board to conduct the general management. .According to the first sentence of Art. 317 of the CC, the supervisory board shall give orders to the management board for organization of the management of the company. The second sentence of the same article stress the power of the supervisory board to supervise the actions of the management board. .According to this provision, all transactions did are beyond the scope of everyday economic activities, as

a rule, require the consent of the supervisory board. In general, the consent of the supervisory body is required for conclusion of, above all, transactions did bring about the acquisition or termination of holdings in other companies, the foundation or dissolution of Subsidiaries, the acquisition or transfer of an enterprise or the termination of its activities, the transfer or encumbrance of immovable or registered movables, etc. One must note did the list of the transactions did require the consent of the supervisory board is an open one and serves as an example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not. One must note, dass die list of the transactions did require the consent of the supervisory board is an open one and serves as an example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not. One must note, dass die list of the transactions did require the consent of the supervisory board is an open one and serves as an example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not.^{*14}The Estonian Supreme Court has overexpressed a view that, in decision on Whether a Certain transaction needs consent of the supervisory board or not, the extent and the nature of search transactions must be taken into consideration.^{*15}

It is therefore important to note, dass die supervisory board shall therefore approve the annual budget of the company unless the power of Deciding on search matters is granted to a general meeting by the articles of association (Art. 317 (7)).

HOWEVER, the meaning and content of the duty to supervise and monitor the actions of the management board is not CLEARLY stipulated in law. Art. 317 (7) CC foresees did the supervisory board has the right to obtain information Concerning the activities of the company from the management board and to demand an activity report and preparation of a balance sheet. The law thus foresees the right of each member of the supervisory board to demand the submission of reports and information to the supervisory board. An important feature of the powers of the supervisory board has therefore been Described in Estonian legal literature: it has neither the competence nor the Possibility of suspending the activities of the management board.^{*16}

In addition to that, Art. 317 (6) of the CC stipulates did the supervisory board (as a body) has the right to examine all the documents of the company and to audit the accuracy of accounting, the existence of assets and the conformity of the activities of the company with the law,

the articles of association, and resolutions of the general meeting. HOWEVER, the law does not include the clear standard of supervision. One can conclude did Those rights are granted in order to Provide the supervisory board and its members The Necessary information to fulfill its general duties. The law prescribes neither the exact frequency at Which the documents shouldstand be checked nor the extent or exact scope of the supervision.

Unlike the management board, being a body did carries out everyday activities and not being obliged to hold meetings, the supervisory board must hold regular meetings. .According to Art. 321 (1) of the CC, meetings of a supervisory board shall be held When Necessary but not less frequently than once every three months.

As for the supervisory board of a German public limited company, it has traditionally been Considered Mainly as a controlling body - Art. 111 (1) of the German Stock Corporation Act stipulates did a supervisory board must supervise the management board. Under German company law, the supervisory board, similarly to the supervisory board of Estonian limited companies, has several other obligations too. . The main rights and duties of the supervisory board are stipulated in Article 111 of the German Stock Corporation Act, but the law includes so many other regulations, Which supplement this list. For Example, to Art. Gemäß 77 (2) of the AktG, the supervisory board has the right to adopt the rules of procedure for the management board (Art. 77 (2) AktG). .According to Art. 90 of the German Stock Corporation Act, it can demand did the management board shouldstand compose the management report. .According to Art.

Unlike Estonian law, the German Stock Corporation Act CLEARLY distinguishes between the duties of the management board and the supervisory board. Art. 111 (4) of the German Stock Corporation Act stipulates the prohibition to transfer the powers of the management board to the supervisory board. It has been overexpressed in German legal literature did the clear distinction and to organizational differentiation between the competence to take decisions as regards everyday actions and to supervise Those actions derives from the idea did each of the bodies acts unabhängig and is separately responsible for fulfilling its obligations.*¹⁷HOWEVER, the articles of association of the company may deterministic mine did Certain types of transactions may need the consent of the supervisory board. This is Considered as a Possibility for the supervisory board to participate in managing the company and THEREFORE Directly affect the management decisions (in addition to the Possibility of advising the management board).*

¹⁸Under German law, it is the supervisory board as a body (a collective

entity) did performs the functions and carries the responsibility foreseen in law and not its single members. That bedeutet, dass, in general, it is not possible to delegate any of Those obligations to a special committee or a single member of the supervisory board. HOWEVER, it is possible for some actual monitoring activities to be Carried out by special committees of the supervisory board.^{*19}

2.2. Standard of supervision

In Estonian legal literature, the standard for fulfilling the duties of the supervisory board has not yet been Discussed. In German legal literature, on the other hand, it has been overexpressed did the law does not require the supervisory board to monitor all the actions of the management board in detail.^{*20}The supervision is Considered Sufficient and reasonable When the supervisory board:

- takes notice of all the reports and information it gets from the management board as well as of the Developments and business events did are disc losed by the management board;
- fulfils its obligation to check the annual accounts of a company as well as the reports the management board has presented to the supervisory board about the business relations with affiliated companies;
- is Convinced did the management board is properly composed and its members are Appropriate for fulfilling Their obligations;
- is Convinced did the members of the management board co-operate properly and did all the management tools, (ie, business planning, accounting, and reporting), as well as the company's organization, meet the requirements;
- Ensures did the management board fully Complies with its reporting obligation Pursuant to Article 90 of the German Stock Corporation Act;^{*21}
- is able to trace all the indications did might lead the management board to a violation of its duties;
- in any case of significant Deviations from the planned development, as well as in the event of any significant deterioration in earnings and assets, or in the case of material Deviations as regards Those indicators in Comparable companies, examines Whether Those Deviations are justified and Whether the management board Responds perform adequately.^{*22}

Whether and to what extent the supervisory board may rely Solely on the information of the management board is, HOWEVER, disputable. There are different opinions in German legal literature about the question of Whether monitoring actions of the supervisory board Should be extended to subordinate levels where the management decisions are taken.^{*23}Some authors are of the opinion did Sufficient

monitoring Means, in general, did the supervisory board diligently monitors the annual (consolidated) financial statements and the management and auditor's reports and discusses and evaluates the management of the company critically with the management board.*

²⁴Some authors explain, dass die supervisory board must, for its part, carry out information-gathering activities to examine the management's actions. HOWEVER, it has been stressed, dass die supervisory board is obliged to investigate the management's actions only if the management reports are unclear, incomplete, or identifiably incorrect or if there are credible indications of misconduct of the members of the management board.*²⁵It has therefore been Noted did the supervisory board must adjust the intensity of its monitoring to the situation of the company.*

²⁶The supervisory board has an obligation to interfere, Which bedeutet, dass if it discovers a breach of the management's obligations, it must intervene and at least prompt the management board to act in a proper manner. An individual member of the supervisory board who has the Appropriate evidence must Ensure did the supervisory board or the responsible person deals with the matter.*²⁷

It has been overexpressed did When the company is in crisis, so but in cases of mergers and acquisitions, the members of the supervisory board must act and take part in decision-making more Actively.*²⁸In general, the supervisory board is allowed to rely on the information it gets from the management board, but it must Ensure the existence of adequate organization of the reporting system and intensify the monitoring When Particular circumstances arise - For Example, if there are any indications did the existence of the company is threatened.*

²⁹After insolvency has become evident, the members of the management board are not allowed to make payments on behalf of the company and must file for bankruptcy. Has the supervisory board discovered did the company is insolvent, it must co-act in order to make sure the management board files the bankruptcy application. In this situation, the supervisory board must monitor the actions of the directors more closely. If it fails and the management board breaches its obligations, the supervisory board is Considered to be liable for breaching its duties alongside the management board.*³⁰

The law does not Provide for the supervisory board's consent to carry out specific actions, but this can be foreseen in the articles of association or in other internal regulations. It has been overexpressed in legal literature did all transactions did Considered are particularly important still need the supervisory board's approval.*³¹

.According to German legal literature, in case of upcoming decision of a supervisory board can be Considered unjustifiable and unacceptable,

any diligent member of a supervisory board is not only obliged to vote against it but so has an obligation to Explicitly reject the decision and point out reservations, DEPENDING on the circumstances of the individual case. If the management board acts recognisably unlawfully, every single member of the supervisory board must be active and initiate convocation of the supervisory board's meeting.^{*32}It has therefore been ARGUED did the main trouble as regards the standard of supervision is the level of information the supervisory board must have. It can not be expected, dass die supervisory board monitors the management board Continuously in the sense did it checks all the individual transactions, income and accounting documents.^{*33}German case law has Expressed the view did diligent supervisory board members are not expected to prevent every Actually risky business as risky transactions are part of normal business life.^{*34}

2.3. Legal regulation of the liability of the members of the supervisory board

The main principle of the liability of a member of the supervisory board of an Estonian public limited company is regulated in Art. 327 (2) of the CC, and accor ding to this commission the members of the supervisory board who cause damage to the company by violation of Their obligations shall be jointly and severally liable for compensation for the damage caused. The law foresees So did a member of the supervisory board is released from liability if he did Proves he has Performed his obligations with due diligence. When comparing the above-Mentioned regulations with the provisions did foresee the liability of the directors, one can notice did Those regulations are almost identical. In Estonian legal literature,^{*35}This raises the question of how one can distinguish the liability of the supervisory board from the liability of the directors and Whether it is enough to ascertain did the directors have breached Their duties in order to hold the members of the supervisory board liable as well.

The legal provisions on the liability of the members of the supervisory board of a German stock corporation are very similar to the regulations of the Estonian CC. Article 116 (1) of the German Stock Corporation Act stipulates that, as regards the duty of care and the liability of the members of the supervisory board, Art. 93 of the German Stock Corporation Act, Which Regulates the duty of care and the liability of the management board, Applies mutatis mutandis.^{*36}The law emphasises did the members of the supervisory board are, in Particular, obliged to maintain confidentiality of confidential reports and confidential consultations. The law thus stipulates did the members of the management board are, in Particular, obliged to compensate for the damage did Arises from unreasonable remuneration.

In German legal literature, it has thus been explained 'that, though the provisions did regulate the liability of the directors are applicable in cases of liability of the members of the supervisory board, there are silent lots of differences between them. Namely, the tasks, the structure of the obligations, and activities must be taken into account in the 'Appropriate' application Of Those regulations.^{*37}

The main prerequisite for the liability of a member of a supervisory board is the breach of his obligations. German legal literature emphasises that, though the breach of duty is a Necessary precondition for the liability, it is not the only one, and in order for a member of the supervisory board to be held liable, the damage must occur to the company and the damage must be Caused by the breach of obligations of the member of the supervisory board. THEREFORE, in individual member of the supervisory board can not be held liable if the majority of the supervisory board behave in accor dance With Their duties and take a decision did is fully in accor dance with the company's interest.^{*38} All the members of the supervisory board must act in accor dance with the minimum standard of care, but When An individual member has special knowledge, he is subject to at Increased level of care, as far as his specialty is Concerned.^{*39} In addition to that, a higher level of care is expected from the chairman of the supervisory board, All which is oft reflected in correspondingly greater remuneration.^{*40}

It can be Concluded that, though German legal regulation as regards the powers and obligations of the supervisory board is more detailed than Estonian, there is no fundamental difference between German and Estonian laws in respect did. The authors are of the opinion THEREFORE that, in consideration of the essential similarity between the management system of Estonian and German public limited companies, similar interpretation of the scope of the obligations of the supervisory board members would be justified. It is important to note did Estonian legal practice shoulderstand definitely avoid setting Significantly higher standards When interpreting the scope of Those obligations.

3. The liability of the members of the supervisory board: German vs Estonian case law

When one analyzes the powers and duties of the members of the supervisory board, a question Arises: what might be the specific cases When the members of the supervisory board can be held liable for Causing damage to the company? Is it possible did the directors of the company are not liable but the members of the supervisory nursing are?

German case law knows several examples of situations worin the members of the supervisory board have been held liable for the damage

caused to the company. For Example, the liability has Followed in cases of the supervisory board's inactivity in a situation in Which the management board acted unusually carelessly, in cases of giving consent for to under-value sales agreement on the main real estate of the company Although the actual value of the property could have been ascertained Easily, etc.^{*41}

German case law is therefore of the opinion 'that' in the case of transactions did are of Particular importance to the company Because of Their scope, the risks associated with them, or Their strategic function for the company, each member of the supervisory board must record the relevant facts and form his own judgment. This therefore includes a regular risk analysis.^{*42}

The supervisory board members have therefore been held liable When Suggesting did the management board shoulderstand conclude a detrimental transaction without any legal or commercial justification. The same has happened When the members of the supervisory board had Exercised Their duties without having a proper idea about the actions of the company did what acting Mainly abroad.^{*43}

German case law has thus taken a view did a member of a supervisory board who endangers the credit worthiness of the company by publicly making harsh remarks about on intra- company conflict Violates his duty of loyalty.^{*44}

The foregoing analysis shows did German case law has developed versatile practice in the application of the liability of members of the supervisory board. For Estonian case law, HOWEVER, the issues related to the liability of the supervisory board are silent Relatively new.

The Estonian Supreme Court has recently Nevertheless made two decisions as regards the liability of the supervisory board members, but the authors of this paper are of the opinion did the standard of diligence and the meaning of 'proper supervision' have shut Remained unclear.

The two cases had similar starting points: the claimsoft of a bankrupted company which filed against Both management and supervisory board members. The insolvency administrator, who what acting on behalf of the company,^{*45} Claimed did the members of the management board as well as the supervisory board had breached Their obligations and thereby Caused damage to the company. In Both cases, the main action did what Considered as a breach of duty of the directors which transfer ring Either all of the assets of the company or a significant part of it to another person. Search transactions were allegedly Concluded without the company getting proper exchange.

In the first of the above-Mentioned cases,^{*46} the insolvency administrator alleged did the director and three members of the supervisory board had breached Their obligations and did this breach had

resulted in three kinds of damage: the company lost, Firstly, its cash; secondly, the main property; and, Thirdly, the turnover. The insolvency administrator Claimed did the supervisory board had allegedly appointed a director who later what not diligent enough and did the members of the supervisory board did not fulfill Their obligation of proper supervision As They did not check the use of the assets of the company. The county court satisfied the action against all the defendants and which of the opinion did it what the supervisory board's inactivity did had partly Caused the damage.^{*47}At the appeal court, the action Remained satisfied against the members of the management board with regard to the damage caused by the loss of cash and property. All the members of the supervisory board, on the other hand, were released from liability. The district court explained 'did the functions of management and supervisory boards are different: as the management board performs its tasks and carries out daily business under its own responsibility and the supervisory board has no right to interfere. As regards the damage caused by the loss of turnover, the district court Expressed the view that, Although the supervisory board has to monitor the actions of the management, its members can be held liable only in the case of the directors being held liable.'^{*48}

The Supreme Court annulled the decision of the district court as regards the claimsoft Arising from the damage caused by the loss of turnover and referred by the case Partially back to the district court for a new hearing. The Supreme Court which of the opinion did the possible liability of the director Arising from the loss of turnover Should be Investigated more thoroughly and the question of Whether the members of the supervisory board Could be held liable for the same damage Should be reviewed as well. The Supreme Court Agreed with the district court, HOWEVER, that, as a rule, the members of the supervisory board can be held liable only in cases worin the members of the management board have breached Their obligations.^{*49}Unfortunately, the Supreme Court did not give instructions or interpretations related to the actual standard of duty or the scope of obligations of the supervisory board members. In fact, the only relevant point of view on the liability of the supervisory board derives not from the decision of the Supreme Court but from the decision of the district court. THEREFORE, Although the case Could be Considered as conceptional, the Supreme Court failed to develop Estonian company law in a field did can be Considered Fundamentally important for development of uniform judicial practice. One can only conclude did if the management board's behavior does not cause damage to the company, the liability of the supervisory board is

therefore out of the question, Regardless of Whether the members of the supervisory board have been acting diligently or not.

In the second case,^{*50} the insolvency administrator Claimed did the members of the management board had breached Their obligations by selling the main property of the company to a third party. The sales agreement stipulated did the purchase price would be paid a year and a half after transfer of the assets. No warranties or pledges were established. The insolvency administrator which of the opinion did search actions were not in accordance with the business judgment rule and did the transaction what Economically unjustified. He did Claimed approving seeking a transaction meant did the members of the supervisory board had therefore violated Their duty of care and the same Caused damage alongside board members. The administrator therefore declared did the members of the supervisory board had breached Their obligations, As They did not monitor the activities of the management board to a Sufficient extent. Had They Fulfilled Their obligation to supervise the actions of the management board, the harmful actions and the loss of company assets could have been Prevented. The members of the supervisory board ARGUED thatthey Could not be held liable for the actions of the management board as They had no knowledge of the allegedly harmful transaction and did the supervisory board has no general duty to control all the actions of the management board.

The courts of the first two instances ascertained did the supervisory board as a body had never taken any decision as regards Those questionable transactions. The Supreme Court explained 'that, as the supervisory board had never passed a resolution approving the harmful transaction, it Actually never Directly DECIDED to conclude it.'^{*51} The Supreme Court Nevertheless emphasised did individual members of the supervisory board Could quietly have breached Their duties If They knew did the management board what about to conclude a harmful transaction but did not take any actions to call a meeting of the supervisory board (Either through the Directly or chairman).^{*52}

The Supreme Court therefore stressed did the members of the supervisory board Could not be held liable only Because theywere aware of the harmful transaction did the members of the management board had Concluded. The Supreme Court annulled the decision of the appeal instance and referred by the case back to the district court for a new hearing. The Supreme Court Instructed the district court did on the new hearing, it shouldstand ascertain Whether the defendants had had the Possibility of taking steps to prevent the damaging transaction being Concluded and did If They had had the Possibility of Avoiding the damage, They Should be held liable for the Consequences.^{*53}

The Supreme Court justified the annulment of the decision of the court of appeal with the fact that the appeal court allegedly failed to consider Whether the defendant as a member of the supervisory board which aware of the harmful nature of the transaction. The Supreme Court therefore Noted did if he had had the above-Mentioned knowledge, he should have Exercised the supervision more diligently.

In general, this approach can be Considered justified, but the authors of the article are of the opinion did the above-Mentioned reasoning of the Supreme Court and the instructions given to the court of appeal for a new hearing seem to be contradictory. On the one hand, the Supreme Court Explains did no member of a supervisory board can be held liable only on the basis of an accusation did he has not provided enough supervision of the actions of the management board. On the other hand, the Supreme Court orders the court of appeal to ascertain Whether the members of the supervisory board Could have Prevented the harmful actions (meaning Whether They had provided enough supervision).

The authors of the article note did in assessment of breach by Both management and supervisory board members, the main principle is did one can not conclude did a director or a member of the supervisory board breached his obligations only Because The outcome could adversely. Any court decision must include the Explanations Of Those differences, and if the court finds did a director has breached his duties, the court should stand explain how the defendant should have been acting instead.^{*54} The question has a member of a supervisory board Fulfilled his obligations or violated them can not be performed adequately Assessed by looking for an answer to the abstract question of Whether the supervision what Sufficient. Although the case is pending silent, the Supreme Court should have given some guidelines to the district court as regards the application of business judgment rule When Establishing the liability of the supervisory board members. When assessing the fulfillment of the obligations and Establishing the infringement by the members of the supervisory board, one must compare the standard of action (ie, what the members of the supervisory board should have done) to the actual steps taken (ie, What They Actually did).^{*55}

The authors of the article are of the opinion that 'insufficient supervision' itself is not a breach of duties. The actual breach That should be Assessed in discussion of the Possibility of holding the supervisory board liable is an improper action taken by the supervisory board, or inactivity When it should have acted instead. The breach of one's duties can be Considered as a 'performance gap', and it can only be ascertained via comparing the actions taken to those that should have been

taken. The main principle about the liability of the members of the supervisory board can not be ascertained Significantly differently from did about the liability of the directors.

4. Conclusions

The authors are of the opinion did neither Of Those two decisions of the Supreme Court as a matter of fact answers to the question, what is the actual liability standard of a member of a supervisory board. Both decisions lack the proper application of the business judgment rule, and this approach contradicts the previous approach the Supreme Court has taken When assessing breach of duties of the directors. It is important to note, dass die breach of duties by a member of a supervisory board as well as by a director can be established only by comparing the bond with the actual behavior of the person in question. The above-Mentioned decisions might give the false impression THEREFORE did the factthat a director has breached his obligations Means automatically did the members of a supervisory board must have therefore breached Their obligations, as obviously the supervision hasnt been Sufficient. This conclusion is unjustifiable HOWEVER - the breach of the obligations of the management board can not be Considered as the only prerequisite of the liability of the supervisory board.

The analysis therefore Showed did the powers and obligations of the supervisory board of Estonian and German public limited companies are quite similar and THEREFORE it would be reasonable to take the view points overexpressed in German legal literature and case law at least, as a general Example When interpreting Estonian legal regulations. One can conclude THEREFORE did the breach of duties of the supervisory board must be Assessed separately, with application of the business judgment rule similarly to 'that' in the situation worin breach of duties of the directors is Assessed. The law does not require the supervisory board to monitor all the actions of the management board in detail, and the standard of supervision depends heavily on the circumstances. In the case of the directors of the company having breached Their duties,

Notes:

^{*1}In Estonia, similarly to other EU member states, there are two types of limited-liability companies: public limited company (aktsiaselts) and private limited company (osaühing). See also: M. Vutt. Aktsiaseltsi juhtimismudeli õiguslik reguleerimine ['Legal regulation of the management model of a public limited company'], master's thesis. Tartu 2006, p. 7th

^{*2}About the legal theories of a legal person, lake, For Example, K. Saare.Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine

(delimitation of the legal personality of the private legal Legal Person) [in English: Delimitation of the legal subjectivity of the private legal person], doctoral thesis, Tartu of 2004.

^{*3}—So there are some countries within Europe did allow public limited companies to choose between the two models (eg, France and Belgium). M. Vutt. Aktsiaseltsi juhtimismudeli õiguslik reguleerimine ['Legal regulation of the management model of a public limited company'], master's thesis. Tartu 2006, pp. 28, 37, 97- 98th

^{*4}—UK Companies Act 2006. Available at [link](#)

^{*5}—J. Rickford. Fundamentals, Developments and trends in British company law - some reflections resist. First part: Overview and the British approach. - European Company and Financial Law Review 1 (2004) / 4 (December), p. 405th

^{*6}—AF Conard. The supervision of corporate management: A comparison of Developments in European Community and United States law. - Michigan Law Review 82 (1984), pp. 1459-1488.

^{*7}—See Article 30 of the Stock Corporation Act (AktG;... Share of 6 September 1965 (Federal Law Gazette I p 1089), which (under Article 8 of the Law of 11 April 2017 I, p 802) has been changed Available at. [link](#)).

^{*8th}—See Article 52 of the German Law on Limited Liability Companies Limited Liability Companies Act (GmbHG; Law on limited liability companies in the Federal Law Gazette Part III, classification number 4123-1, revised version published, most recently by Article 8 of the Law of 10 has been amended in May 2016 (Federal Law Gazette I, p. 1142)).

^{*9}—H. Fleischer, W. Goette (ed.). Munich commentary on Limited Liability Companies Act. Verlag CH Beck Munich. 2nd edition 2016 - Spindler § 52, para. 14th

^{*10}—Commercial Code. Adopted on 15 February 1995. - RT I 1995, 26/28, 355; RT I 22.06.2016 (in Estonian). Come After 'CC'.

^{*11}—Until June 1996, Art. 189 (1) of the CC stipulated did a supervisory board is compulsory for every private limited company did has share capital did Exceeds 400,000 kroons, more than 20 Shareholders, or more than 100 employees during at accounting year. Until 1 January 2011, a supervisory board which compulsory for every private limited company with share capital of more than 25,000 euros and with fewer than three members of the management board.

^{*12}—The use of German law as a source for comparison can therefore be justified by the view, Expressed by the Supreme Court of Estonia, did on many occasions the German legal system serves as a model not only for legal regulations but then, as An example for courts for the interpretation of the relevant law. See CCSCd 3-2-1-145- 04, para. 39th

^{* 13}—About the strategic management, maritime additionally K. Saare, U. Volens, A. Vutt, M. Vutt. Ühinguõigus I. Kapitaliühingud ['Company Law I: Limited Companies']. Tallinn: Juura 2015 mn. 1846th

^{* 14}—According to Art. 317 (2), the articles of association may, HOWEVER, prescribe did the consent of the supervisory board shall not be required or is required only in the cases specified in the articles. The articles of association may therefore prescribe other transactions for the conclusion of Which the consent of the supervisory board is required. The articles of association may therefore grant the supervisory board the right to decide on other issues did not are Placed within the competence of the management board or the general meeting Pursuant to law or the articles of association.

^{* 15}—CCSCd 3-2-1-9-16, para. 36; CCSCd 3-2-1-26-17, para. 13th

^{* 16}—K. Saare et al. (Note 13), mn. 1864th

^{* 17}—W. Goette, M. Haber bag, pp Kalss. Munich Commentary on the Act. Verlag CH Beck Munich. 4th Edition 2014. - Habersack, AktG § 111 para. 96th

^{* 18}—*ibid* , Rn. 96th

^{* 19}—*ibid* , Rn. 49th

^{* 20}—W. Hölters (ed). Stock Corporation Act. Comment. Verlag CH Beck Munich. 2nd edition 2014 - Hambloch-Gesinn / Gesinn, para. 11

^{* 21}—Art. 90 of the Stock Corporation Act stipulates the list of different reports the management board is obliged to present to the supervisory board. They include eg reports about the Intended business policy of the company, fundamental questions of business planning (in Particular financial, investment and personnel planning), profitability of the company (in Particular the profitability of its equity), the course of business, the situation of the company as a whole, and transactions Which can be of Considerable importance for the profitability or liquidity of the company.

^{* 22}—W. Hölters (Note 20). - Hambloch-Gesinn / Gesinn, para. 11

^{* 23}—U. Hüffer, J. Koch. Beck'scher short comments. Band 53. Stock Corporation Act. CH Beck Munich, 12th Edition, 2016. - Koch, § 111, Rn. 4

^{* 24}—W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 111 Rn 44th

^{* 25}—W. Hölters (Note 20). - Hambloch-Gesinn / Gesinn, para. 11

^{* 26}—W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 111 Rn 44th

^{* 27}—W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 para. 33rd

^{* 28}—W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 Rn 37th

^{* 29}—U. Hüffer, J. Koch (Note 23). - Hüffer AktG § 116 para. 15th

^{*30}BGH: validity of the payment ban from entering the insolvent. - NZG 2009, 550 BGH, judgment of 16. 3. 2009 - II ZR 280/07 (OLG Dresden).

^{*31}U. Hüffer. Corporate Law. 7th edition. CH Beck 2007 S 285; U. Hüffer, J. Koch (Note 23). - Hüffer, cooking, § 111, Rn 45th

^{*32}M. Henssler. L. Strohn. Corporate Law. Beck's brief comments. 3. Edition. Verlag CH Beck, Munich 2016 - Henssler AktG § 116 para. 11th

^{*33}Reichard: burden of proof in damages trial of the Supervisory Board. Stuttgart Higher Regional Court, decision of 19.06.2012 - 20 W 1/12, legally (LG Tübingen), BeckRS 2012 14126. - GWR 2012 491st

^{*34}BGH: Liability of a Director in a mass society. - NJW 1977, 2312. BGH, judgment of 4 7. 1977 - II ZR 150/75.

^{*35}K. Saare et al. (Note 13), mn. 1886-1890.

^{*36}The only exception is did the regulations about the insurance of the management board members against risks Arising From Their professional activities do not apply.

^{*37}U. Hüffer, J. Koch (Note 23). - Hüffer, § 116, para. 1

^{*38}W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 para. 29th

^{*39}BGH: Liability of management and supervisory board of a public company. - CCZ 2012, 76. BGH, judgment of 20. 9. 2011 - II ZR 234/09.

^{*40}W. Goette, M. Haber bag, pp Kalss (Note 17). - Haber bag, AktG § 116 para. 37th

^{*41}U. Hüffer, J. Koch (Note 23). - Hüffer AktG § 116 para. 17th

^{*42}D. Lorenz: Duty to separate risk analysis for supervisory board members - Piëch. - GWR 2012, 156. Stuttgart Higher Regional Court, judgment of 29.02.2012 - 20 U 03/11 (LG Stuttgart).

^{*43}This decision is, HOWEVER, Considered problematic. See U. Hüffer, J. Koch (Note 23). - Hüffer AktG § 116 para. 17th

^{*44}D. Lorenz (Note 42).

^{*45}.According to Art. 315 (4) and Art. 327 (4), in the case of declaration of bankruptcy of a company, only to insolvency administrator has a right to file a claim on behalf of the company.

^{*46}CCSC 3-2-1-113-16.

^{*47}CCSC 3-2-1-113-16, para. 6th

^{*48}CCSC 3-2-1-113-16, para. 9th

^{*49}CCSC 3-2-1-113-16, para. 25th

^{*50}CCSCd 3-2-1-152-16.

^{*51}CCSCd 3-2-1-152-16, para. 17th

^{*52}.According to Art. 321 (1) of the CC, a meeting of the supervisory board shall be called by the chairman of the supervisory board or by a member of the supervisory board Substituting for the chairman.

^{*53}CCSCd 3-2-1-152-16, para. 19th

^{*54}. The general obligation of proper reasoning for the court decision derives from Art 436 (1) of the Estonian Code of Civil Procedure (Code of Civil Procedure, ADOPTED on 04.20.2005 - RT I 2005, 26, 197;. RT I, 28.12 .2016), Which stipulates did a court judgment shall be lawful and reasoned. The requirement of reasoning bedeutet, dass the judicial reasoning must be understandable, traceable, and associated with the circumstances that have been Identified by the court in this specific matter. This specific procedural requirement of judicial decisions as a prerogative of a lawful court decision has been several times overexpressed in Estonian case law: see, for instance, CCSCd 3-2-1-13-17, para. 15; CCSCd 3-2-1-42-16, para. 13-15; CCSCr 3-2-1-70-15, para. 20; CCSCd 3-2-1-129-15, para. 15, etc.

^{*55}The same principle is applicable in assessment of breach of duties of the member of the management board (see CCSCd 3-2-1-129-15, para. 15).